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Appeal of Clark County Superior Court Case No. 15-2-02827-1

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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TIMOTHY WHITE

Petitioner,

v.

CLARK COUNTY

Respondent.

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RESPONDENT'S BRIEF

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## TABLE OF CONTENTS

	<b>Page</b>
I. INTRODUCTION .....	1
II. RESPONSE TO ASSIGNMENT OF ERRORS .....	2
III. STATEMENT OF THE CASE.....	3
IV. ARGUMENT.....	9
A. Standard of Review .....	9
B. The Superior Court Correctly Denied White’s Request for Voted Ballots Pursuant to the Public Records Act .....	10
C. Disclosure of Voted Ballots Would Violate Constitutional and Statutory Secrecy and Security Provisions as Applied in Washington Cases.....	20
D. Nondisclosure of Ballots is Necessary to Protect a Vital Governmental Interest.....	26
E. White’s Public Interest Arguments are Without Merit.....	27
F. The Superior Court Correctly Concluded that White was not Entitled to Costs Incurred and, further, Applied the Correct Calculation for the Award of Attorney Fees .....	31
V. CONCLUSION.....	33

## TABLE OF AUTHORITIES

	<b>Pages</b>
<i>Cases:</i>	
<i>Adams v. King County</i> , 164 Wn.2d 640, 192 P.3d 891 (2008).....	17
<i>AmeriQuest Mortg. Co. v. Office of Attorney Gen.</i> , 170 Wn.2d 418, 241 P.3d 1245 (2010).....	12-13, 15
<i>Bldg. Indus. Ass’n of Wash. v. McCarthy</i> , 152 Wn. App. 720 218 P.3d 196 (2009).....	17
<i>Chelan County v. Nykriem</i> , 146 Wn.2d 904, 52 P.3d 1 (2002) .....	16-17
<i>City of Seattle v. Grundy</i> , 86 Wn.2d 49, 541 P.2d 994 (1975) .....	11
<i>DeLong v. Parmelee</i> , 157 Wn. App. 119, 236 P.3d 936 (2010).....	10
<i>Earley v. State</i> , 48 Wn.2d 667, 296 P.2d 530 (1956) .....	14
<i>Freedom Foundation v. Gregoire</i> , 178 Wn.2d 686, 310 P.3d 1252 (2013).....	10, 15, 24
<i>Hangartner v. City of Seattle</i> , 151 Wn.2d 439, 90 P.3d 26 (2004).....	12
<i>Herald-Republic</i> , 170 Wn.2d 775, 246 P.3d 768 (2011).....	10
<i>In re Det. Of Williams</i> , 147 Wn.2d 476, 55 P.3d 597 (2002) .....	17
<i>Lindeman v. Kelso Sch. Dist. No. 458</i> , 162 Wn.2d 196, 172 P.3d 329 (2007).....	9
<i>Nissen v. Pierce County</i> , No. 44852-1-II.....	32
<i>O’Neil v. City of Shoreline</i> , 170 Wn.2d 138 (2010) .....	32
<i>Progressive Animal Welfare Soc’y v. Univ. of Wash.</i> , 125 Wn.2d 243, 884 P.2d 592 (1994).....	4, 11-12, 25

<i>Rental Hous. Ass'n of Puget Sound v. City of Des Moines</i> , 165 Wn.2d 525, 199 P.3d 393 (2009).....	10
<i>Sanders v. State</i> , 169 Wn.2d 827, 240 P.3d 120 (2010) .....	31-33
<i>Spokane Research &amp; Defense Fund v. City of Spokane</i> , 155 Wn.2d 89, 117 P.3d 1117 (2005).....	10
<i>State ex rel. Doyle v. Superior Court</i> , 138 Wn. 488, 244 P. 702 (1926).....	11
<i>State ex rel. Empire Voting Mach. Co. v. Carroll</i> , 78 Wn. 83, 138 P. 306 (1914).....	13
<i>State ex rel. Shepard v. Superior Court of King County</i> , 60 Wn. 370, 111 P. 233 (1910).....	18
<i>Weyerhaeuser Co. v. State</i> , 86 Wn.2d 310, 545 P.2d 5 (1976).....	13-14
<i>White v. Clark Cnty.</i> , 188 Wn. App. 622, 354 P.3d 38 (2015), <i>review denied</i> , 185 Wn.2d 1009 (2016) .....	1, 3-6, 8, 10-12, 14-16, 23-27
<i>White v. Skagit Cnty.</i> , 188 Wn. App. 886, 335 P.3d 1178 (2015), <i>review denied</i> , 185 Wn.2d 1009 (2016).....	1, 3-6, 8-12, 15-16, 19, 21-27, 32
<b>Statutes:</b>	
Laws of 1994, ch. 42, § 1,.....	12
RCW 4.24.580 .....	12
RCW 5.60.060 .....	12
RCW 19.108.010 .....	11
RCW 19.108.020 .....	11
RCW 19.108.050 .....	12
RCW 29A.04.008.....	4, 26
RCW 29A.04.611.....	13-14
RCW 29A.08.710.....	21
RCW 29A.12.010.....	31
RCW 29A.12.020.....	31
RCW 29A.12.050.....	31

RCW 29A.12.130.....	28
RCW 29A.40.100.....	28
RCW 29A.40.110.....	31
RCW 29A.60.040.....	31
RCW 29A.60.050.....	28
RCW 29A.60.090.....	31
RCW 29A.60.100.....	2
RCW 29A.60.110.....	8, 15-18, 32
RCW 29A.60.120.....	31
RCW 29A.60.125.....	18, 26, 31
RCW 29A.60.140.....	28-29
RCW 29A.60.160.....	31
RCW 29A.60.170.....	17, 26, 28
RCW 29A.60.185.....	32
RCW 29A.60.230.....	20
RCW 29A.60.235.....	29, 31
RCW 29A.64.041.....	28
RCW 29A.84.420.....	17-18
RCW 29A.84.540.....	17
RCW 40.14.030 .....	17
RCW 40.14.060 .....	17
RCW 42.56.070 .....	15-17, 24-25
RCW 42.56.210 .....	5, 26
RCW 42.56.550 .....	3
RCW 42.56.560 .....	31
Title 29A RCW .....	1-2, 4-5, 7-8, 15, 19-20, 22, 26-28, 31, 33
WAC 434-250-110.....	14-15, 27
WAC 434-261-010.....	28
WAC 434-261-045.....	2, 14-15, 26
WAC 434-261-102.....	30
WAC 434-261-045.....	26
WAC 434-262-020.....	20
WAC 434-262-025.....	29
WAC 434-335-040.....	30
WAC 434-335-330.....	31
WAC 435-250-110.....	26

**Rules:**

CR 11 .....	29, 32
-------------	--------

***Constitutional Provisions:***

Washington Constitution, Art. VI, Sec. 6 ..... 1-2, 7, 10, 13, 20-21, 33

***Other Authorities:***

26 Am. Jur. 2d Elections § 307 (2012) ..... 19

## I. INTRODUCTION

The secrecy and security of the ballot is required by Washington Constitution Art. VI, Sec. 6, and Title 29A RCW. It is the policy of the State of Washington to protect the integrity of the electoral process by inviting party observers and the public to observe all ballot processing as it occurs, while guarding against discrimination and fraud by maintaining ballot secrecy and security. Accordingly, upon receiving Timothy White's (hereinafter "White") request for copies of "all election records" from the November 5, 2013 General Election, Clark County (hereinafter "County") withheld voted ballots, but produced all other responsive records, which totaled over 100,000 records. The Clark County Superior Court denied White's subsequent motion to show cause, concluding that the County properly withheld voted ballots, while producing more than 100,000 other election records.<sup>1</sup>

This Court should affirm the superior court's order for several reasons. First, the order, which follows the two appellate decisions on White's 2013 requests for electronic or digital images of voted ballots,<sup>2</sup> does not conflict with any precedent of this Court. Second, there are ample

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<sup>1</sup> CP 504-509.

<sup>2</sup> *White v. Clark Cnty.*, 188 Wn. App. 622, 354 P.3d 38 (2015), *review denied*, 185 Wn.2d 1009 (2016) (hereinafter "*Clark Court*"); *White v. Skagit Cnty.*, 188 Wn. App. 886, 355 P.3d 1178 (2015), *review denied*, 185 Wn.2d 1009 (2016) (hereinafter "*Skagit Court*").

safeguards and avenues for the public to oversee elections without compromising the ballot secrecy or security mandated by the Washington State Constitution. Finally, the superior court's order protects ballot secrecy and security consistent with Art. VI, Sec. 6 and Title 29A RCW.

## **II. RESPONSE TO ASSIGNMENTS OF ERRORS**

1. The superior court correctly denied White's request for voted ballots, pursuant to the Public Records Act. Both Division One and Division Two of the Washington Court of Appeals have held that the legislative definition of "ballot" includes digital images and all voted ballots, in their entirety until destroyed, are an exemption to the Public Records Act (hereinafter "PRA") established by each of the following: (1) Article VI, Sec. 6 of the Washington Constitution; (2) Title 29A RCW, specifically including RCW 29A.60.100 and .125; (3) WAC 434-261-045; and (4) relevant precedent.

2. The superior court correctly denied White's request for voted ballots, as disclosure of any voted ballots, redacted or not, would violate all applicable Washington constitutional, statutory and case law.

3. The superior court correctly remained unpersuaded by White's argument that withholding voted ballots impedes a vital government interest, as the Court of Appeals has already held that

exempting ballots from production ensures their safety and security, a finding this Court declined to review.

4. The superior court correctly remained unpersuaded by White's public interest arguments, since the Court of Appeals has already held that the legislature has enacted a comprehensive elections statute, which balances public oversight with constitutional requirements for ballot secrecy and security, a finding this Court declined to review.

### III. STATEMENT OF THE CASE

In 2013, White requested "copies of electronic or digital image files of all pre-tabulated ballots received, cast, voted, or otherwise used in the 2013 general election" from several counties in Washington.<sup>3</sup> As did every other county, Skagit, Island and Clark counties denied White's request for disclosure of the requested ballots.<sup>4</sup>

White sought review in superior court, pursuant to RCW 42.56.550, which requires counties to show cause why they refuse to allow inspection or copying of requested records.<sup>5</sup> Both the Clark and Snohomish County Superior Courts denied White's show cause motions and he appealed these denials to Division One and Division Two of the

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<sup>3</sup> CP 211-213; see also, **App.1**.

<sup>4</sup> CP 167-173; CP 202 lines 2-25; see also, *White v. Skagit Cnty.*, 188 Wn. App. 886, 335 P.3d 1178 (2015), *review denied*, 185 Wn.2d 1009 (2016).

<sup>5</sup> *White v. Clark Cnty.*, 188 Wn. App. 622, 354 P.3d 38 (2015), *review denied*, 185 Wn.2d 1009 (2016), and *White v. Skagit Cnty.*, 188 Wn. App. 886, 355 P.3d 1178 (2015), *review denied*, 185 Wn.2d 1009 (2016).

Court of Appeals, respectively.<sup>6</sup> Both of these divisions of the Court of Appeals reached the same conclusion: The body of law directing the security and handling of ballots, including facsimiles and electronic images of ballots, as defined under RCW 29A.04.008(1), effects the purpose of a constitutional mandate for ballot safety and security and precludes disclosure of ballots under the PRA.

In upholding the Snohomish County Superior Court’s decision, the *Skagit Court* considered “whether copies of ballots are exempt under an ‘other statute,’” recognizing that “[a]n exemption may be found in an ‘other statute’ even if it is not stated explicitly.” *White v. Skagit Cnty.* at 355 P.3d 1181, citing, RCW 42.56.070(1); *Progressive Animal Welfare Soc’y v. Univ. of Wash., (PAWS II)* 125 Wn.2d 243, 263-64, 884 P.2d 592 (1994). The *Skagit Court* held that “releasing voted ballots [including digital copies] for general public inspection would risk revealing the identity of individual voters,” “many provisions” in Title 29A “already exist for citizen oversight of elections” and “redaction will not eliminate the risk that disclosing copies of ballots will reveal the identity of individual voters,” and thus, “[b]allots are exempt in their entirety.” *White v. Skagit Cnty.*, 355 P.3d at 1183, 1185. (*Emphasis added.*) The *Clark Court* took a consistent approach and reached the same conclusion,

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<sup>6</sup> *Id.*

emphasizing ballot security required under RCW 29A. See *White v. Clark Cnty.*, 188 Wn. App. 622, 637, 354 P.3d 38, 44 (2015).

On appeal in both cases, amicus raised the issue of whether ballots could be released after the statutory secure storage period.<sup>7</sup> Because this issue was raised for the first time on appeal, the *Clark Court* declined to consider it.<sup>8</sup> The *Skagit Court*, however, held that “[i]n Title 29A RCW, the legislature has gone into great detail to ensure that the process of collecting, counting, storing, and ultimately destroying ballots achieves the constitutional mandate for a secret ballot.” *White v. Skagit Cnty.*, 355 P.3d at 1183. (*Emphasis added.*)

The *Skagit Court* then held, “[w]e conclude that in Washington, all ‘ballots’ including copies, are exempt from production under the Public Records Act by Title 29A RCW-an ‘other statute.’ The exemption is necessary to protect the ‘vital governmental function’ of secret ballot elections. RCW 42.56.210(2).” *White v. Skagit Cnty* 355 P.3d at 1184. (*Emphasis added.*)<sup>9</sup> White petitioned this Court for review of both the

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<sup>7</sup> *Clark*, 188 Wn. App. at page 637; *Skagit*, 355 P.3d at page 1181.

<sup>8</sup> *Clark*, 188 Wn. App. at page 637, footnote 6.

<sup>9</sup> White also included the 60-day retention period argument in his Petition for Direct Review to the Court in this case.

*Skagit* and *Clark* decisions. On March 4, 2016, this Court denied review of both decisions.<sup>10</sup>

On July 2, 2015, three days after receipt of the *Clark Court* decision, White sent a public records request for “all election records,” including voted ballots from the November 5, 2013, election to Clark County.<sup>11</sup> Because they have been the subject of ongoing litigation, the County has retained all records pertaining to the November 5, 2013, election.<sup>12</sup> The County responded within five days, as required, letting White know he would receive his first record installment by July 23, 2015.<sup>13</sup> On July 23, 2015, Elections Supervisor Cathie Garber mailed White a thumb drive containing 93,807 digital images of affidavit envelopes with all associated metadata intact via certified mail.<sup>14</sup> On September 2, 2015, Ms. Garber mailed White a 1,970 page ballot exemption log, as well as a thumb drive containing 8,985 pages of

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<sup>10</sup> *White v. Clark Cnty.*, 188 Wn. App. 622, 354 P.3d 38 (2015), *review denied*, 185 Wn.2d. 1009 (2016) at **App. 2**; *White v. Skagit Cnty.*, 188 Wn. App. 886, 335 P.3d 1178 (2015), *review denied*, 185 Wn.2d. 1009 (2016) at **App. 3**.

<sup>11</sup> CP p. 75, lines 15-19; CP pp. 92-93. In his brief to the superior court, White stated that his July 2, 2015 public records request was “substantially identical” to his November 6, 2013 request. CP 146, lines 24-26. On November 6, 2013, White requested “images of pre-tabulated ballots from the 2013 general election.” See **App. 1**. On July 2, 2015, however, White requested “all election records” from the 2013 general election. See **App. 4**.

<sup>12</sup> CP p. 52, lines 6-8.

<sup>13</sup> CP p.75, lines 15-21; CP 95.

<sup>14</sup> CP p. 76, lines 10-23; CP pp. 101.

additional responsive documents.<sup>15</sup> These documents included detailed reconciliation reports and other documents used to check and verify the accuracy of tabulation.<sup>16</sup> Ms. Garber's September 2, 2015 letter explained that the County could not produce voted ballots, based on Washington Constitution Article VI, Sec. 6, Title 29A RCW, and the two Court of Appeals' decisions upholding the denial of his prior requests for ballots.<sup>17</sup>

On October 15, 2015, Ms. Garber mailed White a thumb drive containing additional responsive records and a three-page list of responsive records the County had only in paper copies, which were available to White to copy or view.<sup>18</sup> Not including the 1,970 page ballot exemption log, the County produced to White over 100,000 responsive documents pursuant to his request for "all election records."<sup>19</sup>

White filed the present lawsuit on October 13, 2015, alleging that Clark County had responded to White's July 2, 2015 records request with only one email and had not produced any records.<sup>20</sup> White continues this pattern of misrepresentation by now characterizing to this Court his July 2, 2015 request as merely a "refresher" of his previous request for digital images of ballots, and further, stating that the superior court "ignored" the

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<sup>15</sup> CP p. 77, lines 3-14; CP 114-117.

<sup>16</sup> CP 114-117.

<sup>17</sup> *Id.*

<sup>18</sup> CP 78, lines 3-19; CP 127-140.

<sup>19</sup> CP pp. 78-80.

<sup>20</sup> CP pp. 1-23.

60-day minimum retention period in his order.<sup>21</sup> White's actual request of July 2, 2015, as discussed, *supra*, and the Court's order, show otherwise.

In its order, the superior court specifically found:

In both of his appeals, White, through amicus briefs, raise the issue of producing ballots after the 60-day retention period of RCW 29A.60.110. Because it determined this issue was raised for the first time on appeal, the *Clark Court* declined to consider whether ballots could be released after the statutory secure storage period. The *Skagit Court*, however, found that in Title 29A RCW, the legislature has gone into great detail to ensure that the process of collecting, accounting, storing, and ultimately destroying ballots achieves the constitutional mandate for a secret ballot. *White v. Skagit County*, 355 P.3d at 1183. The Court then held:

We conclude that in Washington, all ballots, including copies, are exempt from production under the Public records act by title 29A RCW as an other statute. The exemption is necessary to protect the vital governmental function of secret ballot elections. RCW 42.56.210 (2).

*White v. Skagit Cnty.*, 855 P.3d at 1184.<sup>22</sup>

Thus, in its order, the superior court explicitly addressed White's 60-day retention period argument. The superior court rejected this

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<sup>21</sup> White also refers to his July 2, 2015 request as one for "anonymous election records," which is another inaccurate characterization of that records request.

<sup>22</sup> CP p. 505, lines 20-27; p. 506, lines 1-6.

argument, citing the above-referenced language from the *Skagit Court* decision.<sup>23</sup>

#### IV. ARGUMENT

Washington law mandates the absolute secrecy and security of ballots until such time as they are destroyed. Washington law defines “ballots” as any media reflecting the choice of an individual voter, including all copies, and further provides for ballot secrecy and security until their destruction. Despite this clear mandate, however, White persists in attempting to obtain records that are exempted by the Washington State Constitution and the voting laws from disclosure under the PRA. Because the applicable law does not support his contentions in this matter, this Court should uphold the superior court’s order.

##### A. Standard of Review.

A public agency's decision to withhold records is reviewed de novo. *Lindeman v. Kelso Sch. Dist. No. 458*, 162 Wn.2d 196, 201, 172 P.3d 329 (2007). In reviewing a PRA request, the appellate court stands in the same position as the superior court. *Lindeman*, 162 Wn.2d at 200, 172 P.3d 329. Where the record consists of only affidavits, memoranda of law and other documentary evidence, the superior court's factual findings on

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<sup>23</sup> CP pp. 505-506. Washington State has a single Court of Appeals, therefore, the *Skagit Court*'s holding regarding cradle-to-grave secrecy and security of voted ballot is binding on the superior court.

disputed issues do not bind the appellate court. *DeLong v. Parmelee*, 157 Wn. App. 119, 143, 236 P.3d 936 (2010). “In construing the PRA, we [must] look at the Act in its entirety in order to enforce the law's overall purpose.” *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 536, 199 P.3d 393 (2009).

Whether to award costs and attorney fees is also reviewed de novo. *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 97, 117 P.3d 1117, 1121(2005).

**B. The Superior Court Correctly Denied White’s Request for Voted Ballots Pursuant to the Public Records Act.**

- 1) The *Skagit* and *Clark* Decisions relied on by the Superior Court are Consistent with this Court’s Recognition that Constitutional Provisions can serve as PRA Exemptions.

Art. VI, Sec. 6 of the Washington Constitution provides, “[a]ll elections shall be by ballot. The legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot.”

“[T]he PRA must give way to constitutional mandates,” *Freedom Foundation v. Gregoire*, 178 Wn.2d 686, 695, 310 P.3d 1252 (2013), and our courts recognize the force behind the argument that constitutional provisions can serve as PRA exemptions. *Herald-Republic*, 170 Wn.2d 775, 808, 246 P.3d 768 (2011). Because the constitutional mandate

extends to the canvassing process, *State ex rel. Doyle v. Superior Court*, 138 Wn. 488, 492, 244 P. 702 (1926), interpreting the PRA to require disclosure of ballots would create an absurd result. See *City of Seattle v. Grundy*, 86 Wn.2d 49, 50, 541 P.2d 994 (1975) (A statute or ordinance that conflicts with a prohibition contained in the constitution is void.) Neither decision in the *Skagit Court* nor the *Clark Court* conflicts with the constitutional mandate, and each follow Supreme Court precedent, as evidenced by this Court's March 4, 2016 denial of review.

2) The PRA and This Court's Precedent Allow for an "Other Statute" to Exempt Records From Disclosure.

This Court has already found that an "other statute" does not need to expressly mention the PRA, especially when disclosure conflicts with the legislative purpose of the other statute. *Progressive Animal Welfare Soc'y v. Univ. of Wash., (PAWS II)*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994). ("Given the *potential* for unfunded biomedical grant proposals to eventuate in trade secrets as broadly defined by the statute, this 'other statute' operates as an independent limit on disclosure of portions of the records at issue here that have even potential economic value.") (*Italics in original.*) In *PAWS II*, this Court found support for this conclusion in a body of statutes, including RCW 19.108.010(4), defining a trade secret; RCW 19.108.020(3), allowing protection of trade secrets by court order;

RCW 19.108.050, giving courts broad authority to preserve the secrecy of trade secrets; Laws of 1994, ch. 42, § 1, p. 130, a legislative declaration of public policy for confidentiality and prevention of unnecessary disclosure; and RCW 4.24.580, anti-harassment law geared to protect researchers.

None of these statutes mentions the PRA.<sup>24</sup>

Additionally, this Court has recognized a public records exemption can exist even in cases where a statute does not expressly mention the Public Records Act or use the word “exemption” or “confidential.” *E.g.*, *Hangartner v. City of Seattle*, 151 Wn.2d 439, 90 P.3d 26 (2004); *PAWS II*, 125 Wn.2d 243, 884 P.2d 592 (1994). Here, as in those cases, the overall statutory scheme does not permit disclosure. Accordingly, the *Skagit* and *Clark Courts* followed this Court’s precedent in finding an exemption exists for voted ballots under the Public Records Act. See *Clark*, 188 Wn. App. at 537; *Skagit*, 355 P.3d at 1184. Again, this Court declined to review these findings.

3) This Court’s Precedent Also Allows for Finding That Some Regulations May Serve as Other Statutes.

Holding that some regulations that are not inconsistent with laws can be “other statutes” under the PRA does not create a conflict either.

See *Ameriquest Mortg. Co. v. Office of Attorney Gen.*, 170 Wn.2d 418,

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<sup>24</sup> *Also see, Hangartner v. City of Seattle*, 151 Wn.2d at 453 (holding that RCW 5.60.060(2)(a), protecting attorney-client communication, is an other statute under the PRA.)

440, 241 P.3d 1245 (2010) (holding that “federal regulation's privacy protections to supplement the PRA's exemptions”). While the *Ameriquest* decision is founded on the primacy of federal law, the decision is equally applicable here where the state constitution mandates that the state legislature protect the secrecy of the vote. See *State ex rel. Empire Voting Mach. Co. v. Carroll*, 78 Wn. 83, 85, 138 P. 306 (1914) (To “guard against intimidation and secure freedom in the exercise of the elective franchise,” Article VI, Sec. 6 of the Washington Constitution admonishes the legislature to “secure to every elector absolute secrecy in preparing and depositing his ballot.”)

This Court certainly need not find that *any* state regulation can support a conclusion that a record is exempt from public disclosure. But here, the legislature specifically and clearly delegated to the Secretary of State the task of developing regulations that preserve the secrecy and security of voted ballots. RCW 29A.04.611(11) and (34) specifically direct the Secretary of State to adopt standards and procedures to “ensure the secrecy of a voter’s ballots” and to “guarantee the secrecy of ballots” – fulfilling the constitutional mandate and the statutory security requirements. The Secretary of State’s regulations, which are part of a body of law providing for ballot security and secrecy, can support a finding of an exemption. See *Weyerhaeuser Co. v. State*, 86 Wn.2d 310,

317, 545 P.2d 5 (1976) (“regulations so adopted [at the express direction of the legislature] are ‘entitled to considerable weight in determining legislative intent,’ unless compelling reasons are presented sufficient to show the scheme is in conflict with the intent and purpose of the legislation.”) citing, *Earley v. State*, 48 Wn.2d 667, 673, 296 P.2d 530 (1956).

The Secretary of State developed regulations, such as WAC 434-261-045 and WAC 434-250-110, to guarantee the secrecy of all ballots mandated by the Washington State Constitution and RCW 29A.04.611(11) and (34). Accordingly, in addressing the question of whether regulations adopted pursuant to specific legislative direction to create “standards and procedures to guarantee the secrecy of ballots” can support an exemption under the PRA, pursuant to the request in that case, the *Clark Court* found:

[O]ur Supreme Court simply rejected the idea that agencies can interpret or directly regulate the applicability of the PRA to protect records from disclosure. *Servais*, 127 Wn.2d at 834-35; *Hoppe*, 90 Wn.2d at 129-30. The situation here is different because the Secretary of State did not attempt to regulate disclosure directly or interpret the disclosure requirements of the PRA. Instead, the Secretary of State implemented regulations to ensure ballot security and secrecy during processing, pursuant to the express enabling provisions of RCW 29A.04.611.

*White v. Clark Cnty.*, 188 Wn. App. at 636.

The *Clark Court* went on to hold that under the *AmeriQuest* and *Freedom Foundation* decisions, WAC 434-261-045 and WAC 434-250-110 (5) create an “other statute” exemption to the PRA under RCW 42.56.070. *White v. Clark Cnty.*, 188 Wn. App. at 636.

4) Title 29A RCW Exempts Elections Records from Public Access.

White’s argument that Title 29A RCW does not exempt ballots from production has already been considered and rejected by both the *Skagit* and *Clark Courts*, again, which this Court declined to review.<sup>25</sup> In *White v. Clark Cnty.*, the Court held:

RCW 29A.40.110 (2) and RCW29A.60.110 constitute express ‘other statute’ exemptions to the PRA. If ballots must be kept secure, they cannot be produced to a third person under the PRA.<sup>26</sup>

*Clark*, 188 Wn. App. at page 632.

Likewise, in *White v. Skagit Cnty.*, the Court of Appeals held:

RCW Chapter 29A provides no procedure to protect the secrecy of the vote upon public disclosure because public disclosure is not contemplated. The lack of any such statutory safeguards indicates the Legislature had no intention that ballots be subject to public disclosure.

*White v. Skagit Cnty.*, 355 P.3d at 1183.

The *Skagit Court* further held:

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<sup>25</sup> See App. 2 and App. 3.

<sup>26</sup> Finding a gap in ballot security from the beginning of processing until tabulation, the *Clark Court* then held that the constitutional provision, statutes and regulations upon which the County claimed an exemption protect both the secrecy of persons’ votes and the security of elections ballots. *Clark*, 188 Wn. App. at 638.

We conclude that in Washington, all “ballots” including copies, are exempt from production under the Public Records Act by Title 29A RCW- an “other statute.” The exemption is necessary to protect the “vital governmental function” of secret ballot elections. RCW 42.56.210(2).

*Id.* at 1184.

Accordingly, both the *Skagit* and *Clark Courts* have rejected White’s arguments that the PRA exemption should be disregarded in this case, and this Court has already declined to review those decisions.

5) The Plain Meaning of RCW 29A.60.110 is That Counties May Discard Ballots After 60 Days.

Despite the clear constitutional, statutory and case law mandates, White argues he is somehow entitled to voted ballots because the 60-day minimum retention period has passed. Once again, White has already raised this issue to this Court in his Petition for Review of the *Clark Court* decision, which this Court denied.<sup>27</sup> The plain language of RCW 29A.60.110 requires that ballots “be retained for at least 60 days.” On its face, this statute provides a 60-day retention period as a floor, not a ceiling. Contrary to White’s apparent argument, the 60-day retention period does not somehow serve as a timer for when a ballot stops being a secret ballot.

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<sup>27</sup> See *Petition for Review, White v. Clark County*, No. 921725, C/A No. 46081-5-II.

“When statutory language is plain and unambiguous, the statute's meaning must be derived from the wording of the statute itself.” *Chelan County v. Nykriem*, 146 Wn.2d 904, 52 P.3d 1 (2002). The plain meaning of RCW 29A.60.110 is that the County may destroy ballots only after that time period has elapsed. See RCW 40.14.060(1); see also, *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 737, 218 P.3d 196 (2009) (“destruction of public records authorized when pursuant to state approved schedule.”) citing, RCW 40.14.060-.070; RCW 40.14.030(1).

White’s argument also fails to acknowledge that the legislature omitted the running of the statutory retention period from the list of four specific circumstances enumerated in RCW 29A.60.110 that allow for the disclosure of ballots. (“The containers may only be opened by the canvassing board as part of the canvas, to conduct recounts, to conduct a random check under RCW 29A.60.170, or by order of the Superior Court in a contest or election dispute.” RCW 29A.60.110). See *Adams v. King County*, 164 Wn.2d 640, 650, 192 P.3d 891 (2008) (“Omissions are deemed to be exclusions”) citing, *In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002).

In addition to mischaracterizing RCW 29A.60.110, White also ignores the body of Washington election laws that prohibits any “person except those employed and authorized by the county auditor [to] touch any

ballot or ballot container.” RCW 29A.60.170. Further, RCW 29A.84.540 makes it a crime to remove a ballot from a voting center. RCW 29A.84.420 prevents unauthorized examination of ballots to identify voters. RCW 29A.60.125 requires sealing “in secure storage . . . **at all times**, except during duplication, inspection by canvassing board, or tabulation.” (*Emphasis added*). These election laws, including RCW 29A.60.110, which requires retention of at least 60 days, fall within the legislature’s authority to enforce the constitutional mandate for ballot secrecy and security, and clearly are an attempt to carry out that mandate. See *State ex rel. Shepard v. Superior Court of King County*, 60 Wn. 370, 372, 111 P. 233 (1910) (“It is not within the power of the legislature to destroy the franchise, but it may control and regulate the ballot, so long as the right is not destroyed or made so inconvenient that it is impossible to exercise it. It follows, then, that that which does not destroy or unnecessarily impair the right must be held to be within the constitutional power of the legislature.”)

The Washington legislature has determined that the right of absolute secrecy applies to all ballots and, to ensure this, has enacted election laws that provide for cradle to grave security for ballots. RCW 29A.84.420 makes it a crime for a person to examine or assist another person to examine a ballot if the person does not have lawful authority.

This statute, which potentially subjects election officials to criminal liability for giving others access to voted ballots, cannot logically be read to require release of ballots in response to a public records request after the 60-day minimum retention period. Instead, when read in conjunction with the other elections statutes ensuring safety and security of voted ballots, it is more appropriate to read this statute to be consistent with complete secrecy and destruction after the retention period has passed.

As discussed on page 8, *supra*, the superior court noted in its order that the *Skagit Court* addressed and rejected White's 60-day retention period argument, citing the *Skagit Court* in finding that "all ballots" are exempt from production under the Public Records Act and that the destruction of ballots "achieves the constitutional mandate for a secret ballot." *White v. Skagit Cnty.*, 355 P.3d at 1183-1184. The *Skagit Court*, thus, correctly indicated that the voted ballots must remain secret and secure until they are destroyed. (See *Skagit* 355 P.3d at 894. "In Title 29A RCW, the Legislature has gone into great detail to ensure that the process of collecting, counting, storing and ultimately destroying ballots achieves the constitutional mandate for a secret ballot.")<sup>28</sup> To find otherwise would

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<sup>28</sup> Public interest is also served by the destruction of ballots. Destruction assures that there will be no retaliation against voters. See *26 Am. Jur. 2d Elections* § 307 (2012) (entitled "Necessity for Secrecy") (A secret written ballot is used "to prevent recrimination against people who vote for losing candidates.").

create a situation where a party could obtain voted ballots simply by filing a public records request and lawsuit after every election.

**C. Disclosure of Voted Ballots Would Violate Constitutional and Statutory Secrecy and Security Provisions as Applied in Washington cases.**

White's argument that releasing ballots would not compromise voter secrecy is unpersuasive. First, contrary to White's allegations, in its Response to White's Motion to Show Cause, the County provided the Court with evidence showing how voter secrecy would be compromised by producing ballots through the Declaration of its Elections Supervisor Cathie Garber.<sup>29</sup> Release of voted ballots creates a risk of violating the ballot secrecy required by Article VI, Sec. 6 of the Washington Constitution.<sup>30</sup> When there is low turnout in a small precinct, a copy of a ballot could be tied back to a voter.<sup>31</sup> Elections administrators have a duty to prevent the release of that information, whether the release occurs days, months, or years after an election, pursuant to WAC 434-262-020 and RCW 29A.60.230.<sup>32</sup>

In addition, various local government jurisdictions often have intersecting boundaries. It is not uncommon for only a small pocket of voters to receive a ballot format containing a particular combination of

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<sup>29</sup> CP 88 lines 18-28; CP 89 lines 1-4.

<sup>30</sup> CP 88 lines 18-19.

<sup>31</sup> CP page 88, lines 19-22.

<sup>32</sup> CP page 88, lines 22-27.

racers. For example, because of the way that local jurisdictional boundaries intersect, a small number of voters could receive the ballot format that contains a raise for a city council election, a certain school district election in the certain local district election (public utility district, port commission, etc.). Suppose all or nearly all of the small number of voters receiving a particular ballot format also voted for the Democratic candidate for governor. This is not something that would be readily apparent to election officials or to observers in their fleeting handling or viewing of ballots during processing. But it is information that someone might glean if given unlimited time and technology to analyze a large set of voted ballots.<sup>33</sup> Thus, a requester could be able to connect a particular voter living in a particular geographic area with a particular vote. Because Article VI, Sec. 6 of the Washington Constitution requires absolute ballot secrecy, any risk that there will be a connection between a voter and a vote requires that voted ballots not be disclosed.

Furthermore, marks placed on ballots by voters can be used to identify voters, such as comments, explanations of voter intent or writing themselves in as a candidate.<sup>34</sup> Voters may also sign their names to ballots

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<sup>33</sup> *Id.* Whether someone returns a ballot in a particular election is public information. See RCW 29A.08.710 (2) (public information includes voting record).

<sup>34</sup> CP page 88, lines 27-28.

when making corrections.<sup>35</sup> Any handwriting on the ballot at all could make a voter identifiable to someone who knows them well, and once a public records requestor has a set of ballots, they could be posted online for all to see. While a voter would expect an election official to see their name or handwriting in this situation, it does not follow that they would expect or want the general public to see their voted ballot.<sup>36</sup> This could have a chilling effect, both on voter choices and turnout. Again, these issues do not disappear with the passage of time.

In addition to ignoring the above evidence submitted in this case, White also ignores the fact that the *Skagit Court* has already held that releasing any voted ballots would compromise absolute voter secrecy, a decision this Court declined to review. The *Skagit Court* held that “releasing voted ballots [including digital copies] for general public inspection would risk revealing the identity of individual voters,” “many provisions” in Title 29A RCW “already exist for citizen oversight of elections” and thus, “[b]allots are exempt in their entirety.” *White v. Skagit*

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<sup>35</sup> CP page 88, lines 28; page 89, line 1. The citation in White’s Opening Brief, page 18, from the Secretary of State’s amicus brief in the *Skagit Court* case refers to county canvassing board deliberations. See *Skagit*, 355 P.3d at 1186. Neither canvassing boards nor the Secretary of State’s Office display ballots. The Secretary of State’s Office never possesses ballots because it is county elections officials and employees only who process, handle and tabulate ballots under the law. In addition, the County is unaware of any county that currently allows its canvassing board to post disputed ballots at canvassing board meetings.

<sup>36</sup> CP page 89, lines 1-3.

*Cnty.*, 355 P.3d at 1183, 1185. The mechanisms for public oversight are discussed in more detail below.

The *Skagit Court* understood how releasing ballots would thwart the constitutional mandate for ballot secrecy:

Releasing voted ballots for general public inspection would risk revealing the identity of individual voters. According to a declaration from the Elections Director in the Office of the Secretary of State, voters sometimes place identifying marks on ballots contrary to voting instructions, for example by signing their names when making corrections or by writing comments about their intent. Each time ballots are handled, there is the potential to misplace, damage or lose them. And, as the Elections Director explains, where there is low turnout in a small precinct, even a ballot devoid of identifying marks can be tied back to a voter by comparing it with voters credited with returning ballots on particular dates.

Releasing copies or images presents the same risk of identification of voters as disclosure of the paper ballot. To hold that a copy or duplicate or image file must be produced in response to a public records request would undermine the constitutional mandate for absolute secrecy of ballots. We conclude that the records White requests are “ballots” and they are subject to the strict statutory regulation of ballot handling and storage.

*White v. Skagit Cnty.*, 355 P.3d at 1183.

White’s next argument, that he is entitled to redacted voted ballots, is also without merit. As previously noted, White has already made this same argument, without success, to two divisions of the Court of Appeals and this Court in his earlier cases. In his Petition for Review of the *Clark Court*’s decision, White argued that the *Clark Court* “ignored” Supreme

Court precedent by not addressing his redaction argument.<sup>37</sup> The *Clark Court*, however, explicitly relied on this Court's precedent in reaching its decision. Because the *Clark Court* found that the Supreme Court's holdings in *AmeriQuest* and *Freedom Foundation* create an 'other statute' exemption to the PRA under RCW 42.56.070 for ballot images in their entirety, there was no need for it to reach White's redaction arguments. *Clark*, 188 Wn. App. at 536. To the extent disclosure of redacted ballots was argued or considered, the *Clark Court* obviously concluded such disclosure would violate the constitutional mandate and legislature's intent of absolute secrecy and security of every ballot and correctly rejected this argument.

On the other hand, the *Skagit Court* specifically addressed and rejected White's redaction argument, finding, "redaction will not eliminate the risk that disclosing copies of ballots will reveal the identity of individual voters."<sup>38</sup> The *Skagit Court* also cited, with approval, the superior court's order which stated:

The Washington Constitution does not allow a scheme that provides for only substantial secrecy and that occasionally allows the identity of voters casting ballots to be mistakenly revealed here. Unbridled and undirected discretion vested in numerous employees as to what is or is not too great a risk for violating secrecy would not comply

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<sup>37</sup> See *Petition for Review, White v. Clark County*, No. 921725, C/A No. 46081-5-II.

<sup>38</sup> *Skagit*, 355 P.3d at 1187.

with the constitutional mandate. The Constitution requires the absolute secrecy.

*Skagit*, 355 P.3d at 1186.

White also asserts the County did not explain why ballots cannot be redacted to preserve secrecy, when, in fact, the County submitted this exact testimony through the declaration of its Elections Supervisor Cathie Garber.<sup>39</sup> White fails to address the evidence in the record that given the available voter data and the existence of different ballot types for small, often overlapping local districts, voters could be readily identified if their ballots were to be released.<sup>40</sup> Nor does White make any effort to demonstrate that redaction would negate the likelihood of voter identification. This evidence was unrebutted below.

Finally, Washington's strict ballot security provisions dictate the way that voted ballots are handled from the moment they arrive in a county's control until they are destroyed pursuant to statute.<sup>41</sup> No person, other than an election official employed by the county auditor, may touch any ballot or ballot container or operate any vote tallying system and the

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<sup>39</sup> CP 88, lines 1-22; see also, *Progressive Animal Welfare Society v. Univ. of Wash.*, 125 Wn.2d 243, 884 P.2d 592 (1994), which holds that "[r]edaction and then release is not required when an "other statute" exempts a record from disclosure under the PRA." Because the election laws governing the security and secrecy of ballots constitute an "other statute" under RCW 42.56.070(1), none of the ballots were subject to disclosure or redaction at the time of White's request.

<sup>40</sup> CP 88, lines 16-22, 27-28; CP 89, lines 1-3. Clark County again notes that, given overlapping district boundaries, only a few voters may be eligible to vote in the same combination of school board, water district and conservation district elections.

<sup>41</sup> CP 86, lines 12-23.

definition of “ballot” includes any record of a person’s vote, whether paper or electronic. RCW 29A.60.170; RCW 29A.04.008. *See also*, WAC 434-261-045 (referring to RCW 29A.60.125, which allows only limited use of ballots and ballot duplicates).

**D. Nondisclosure of Ballots is Necessary to Protect a Vital Governmental interest.**

Once again, White argues an issue which has already been decided, as both the *Clark* and *Skagit Courts* held that exempting ballots from disclosure protects a vital governmental interest. When presented with this issue, the *Skagit Court* stated:

We conclude that in Washington all “ballots” including copies are exempt from production under the Public Records Act by Title 29A RCW – an “other statute.” The exemption is necessary to protect the vital governmental function of secret ballot elections. RCW 42.56.210 (2). We join our colleagues in Division 2 who recently reached the same conclusion in White’s similar appeal of a decision dismissing his action in Clark County.

*Skagit* at 1184-1185. (*Emphasis added.*)

Similarly, the *Clark Court* held:

Here, the constitutional provisions, statutes and regulations upon which the county claims an exemption to protect both the secrecy of persons’ votes and the security of election ballots as discussed above, Article VI, Sec. 6 of the Washington Constitution recognizes a right to the secrecy of the vote. Title 29A RCW, WAC 434-261-045 and WAC 435-250-110 (5) set procedures and requirements that protect this right and to keep ballots secure. Preserving the

integrity and secrecy of votes and the security of election ballots clearly is a vital government function.

*White v. Clark County* 188 Wn. App. at 638. (*Emphasis added.*)

Finally White's invitation to apply out-of-state law to interpret the Washington State Constitution should once again be rejected. As the *Skagit* Court held:

On occasion, courts in other states have allowed ballot images to be released to the public. White cites *Marks v. Koch* 284 P.3d 118 (Colo App. 2111), and *Price v. Town of Fairlee*, 211 VT 48. These cases are not persuasive in our interpretation of Washington law, as they were decided within different statutory frameworks and under different factual circumstances.

*Skagit* 355 P.3d at 1184.

**E. White's Public Interest Arguments are Without Merit.**

1) Title 29A RCW Provides a Comprehensive Plan for Citizen Oversight of the Election Process.

White argues, next, that the superior court's order denying his motion to show cause "eliminates public oversight" in ensuring an election winner actually receives the majority of votes.<sup>42</sup> Once again, this issue has already been raised by White and found to be unsupported by the current law.<sup>43</sup> Washington's legislature has provided for citizen oversight of ballot processing and tabulation to facilitate transparency and the

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<sup>42</sup> Instead, the law is clear that a constitutional issue arises only if White were allowed access to voted ballots, absent an election dispute. See discussion, *supra*.

<sup>43</sup> "White's argument that even greater transparency would promote public confidence in elections as a matter of policy with the Legislature to consider it is not supported by the statutes as they are currently written." *Skagit*, 355 P.3d at 1184.

opportunity for timely election challenges where necessary, while also maintaining strict protocols to minimize the risk of fraud or mistake in vote counting.

The political parties and other organizations can designate official observers whom the county auditors must allow to observe ballot processing.<sup>44</sup> Before an election, observers and the public must be permitted to watch testing of vote tallying systems.<sup>45</sup> Once ballot processing begins, counting centers must be open to the public.<sup>46</sup> Anyone can watch, but only employees and those specifically authorized by the county auditor can touch any ballot, ballot container or vote tallying system.<sup>47</sup> Political party observers can call for a random check of ballot counting equipment.<sup>48</sup> Observers may also attend any recount, though they cannot handle ballots or record information about voters or votes.<sup>49</sup>

When election officials question the validity of a challenged or provisional ballot, or when the intent of the voter cannot be resolved, the county canvassing board determines how the votes will be counted.<sup>50</sup> Meetings of the county canvassing board are open public meetings. Notice

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<sup>44</sup> RCW 29A.40.100; RCW 29A.60.170

<sup>45</sup> RCW 29A.12.130

<sup>46</sup> RCW 29A.60.170; WAC 434-261-010.

<sup>47</sup> WAC 434-261-010.

<sup>48</sup> RCW 29A.60.170(3).

<sup>49</sup> RCW 29A.64.041(3).

<sup>50</sup> RCW 29A.60.050, .140.

must be published and the board must make any rules available to the public.<sup>51</sup>

Finally, the county auditor must prepare and make publicly available detailed reports that precisely reconcile the number of ballots received, counted and rejected, including specific accounting for various ballot types (for example, provisional ballots).<sup>52</sup> Public oversight of ballot processing and tabulation from start to finish, along with public reconciliation reports, allow a public check on all elections.

Multiple safeguards exist to ensure election accuracy and White's contention that the superior court's decision, which follows the Court of Appeals' precedent on this same issue, eliminates public oversight of the elections process, is completely meritless.

2) The Superior Court Correctly Denied White's Assertion That Withholding Voted Ballots Leads to "Fraud, Hacking" as There is no Evidence in the Records Supporting These Claims.

Before the superior court, White ignored the *Clark* and *Skagit Court* decisions by arguing that his inability to obtain voted ballots, absent a court order in an election dispute, violated the PRA and raised the specter of fraud, hacking and delayed access to ballots. As with every other argument in his Opening Brief, White's "public oversight" argument

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<sup>51</sup> RCW 29A.60.140(5); WAC 434-262-025.

<sup>52</sup> RCW 29A.60.235.

is a repetition of the same argument he has raised before. Even if this Court were inclined to consider this argument, it also fails on its merits.

First, no evidence or argument in the record supports White's insinuations of fraud. The articles he cites regarding the Ashley Madison website hacking, Initiative 276 and elections in Kansas have nothing to do with Washington State elections or whether ballots are public records.

Furthermore, there is simply no credible evidence of hacking or election tampering, either specifically in the present case or with the process, in general. The evidence in the record is that the Ballot and Tally Now computers are not connected to any network and a data card is used to transfer data between the two computers.<sup>53</sup> The computers are kept secure, access to them is severely restricted and tracked and election officials must work in teams of at least two people when tabulating or preparing for tabulation.<sup>54</sup> Systems must pass a logic and accuracy test prior to each election and the parties can randomly call for a test of the

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<sup>53</sup> See CP 85, lines 1-7; CP 87, lines 21-27; *see also*, WAC 434-335-040 provides, in part:

- (3) A vote tabulating system must:
  - (a) Be capable of being secured with lock and seal when not in use;
  - (b) Be secured physically and electronically against unauthorized access;
  - (c) Not be connected to, or operated on, any electronic network including, but not limited to, internal office networks, the internet, or the world wide web. A network may be used as an internal, integral part of the vote tabulating system but that network must not be connected to any other network, the internet, or the world wide web; and
  - (d) Not use wireless communications in any way.

<sup>54</sup> WAC 434-261-102.

system mid-election.<sup>55</sup> Moreover, all counties must submit precise reconciliation reports to the Secretary of State that reconcile numbers of ballots as they move through the tabulation process, ending in secure storage.<sup>56</sup>

**F. The Superior Court Correctly Concluded that White was Not Entitled to Costs Incurred and, Further, Applied the Correct Calculation for the Award of Attorney Fees.**

White's request for attorney's fees, costs and daily penalties is completely without merit.<sup>57</sup> The amount of the attorney fee award in PRA cases is reviewed for abuse of discretion. *Sanders v State*, 169 Wn.2d 827, 866-67, 240 P.3d 120 (2010). RCW 42.56.560(4) which provides:

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars

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<sup>55</sup> WAC 434-335-330.

<sup>56</sup> RCW 29A.60.235. White's public interest argument also ignores the legislature's balancing of ballot security with public oversight and the County's unchallenged compliance with requirements for ballot security. The legislature requires that counties only use voting systems approved by the Secretary of State to meet all the requirements of Title 29A RCW, RCW 29A.12.010, RCW 29A.12.020, including precise direction on the counting and rejection of votes, RCW 29A.60.040 and RCW 29A.12.050; a post-election audit of results, RCW 29A.60.185; systems maintenance, RCW 29A.60.090; and the inspection and handling of ballots, RCW 29A.60.110, -.120, -.125, and -.160.

<sup>57</sup> Indeed before the superior court the County requested CR 11 sanctions, explaining in its brief, "White's continued, incorrect assertion that he is entitled to obtain voted ballots under the Public Records Act, is not the basis for the County's CR 11 motion for sanctions. Rather, it is the willful or negligent misrepresentation to this Court regarding the County's response to White's July 2, 2015 public records request, and it provides the basis for the Court to award sanctions against White's counsel." CP 47, lines 14-28; CP 48, lines 1-18.

for each day that he or she was denied the right to inspect or copy said public record.

As the superior court found that the County, which produced over 100,000 responsive records to White, is the prevailing party, White was not entitled to attorney fees, costs or a daily penalty.<sup>58</sup> Assessment of penalties or attorney fees, if any, is a function of the superior court. *Nissen v. Pierce County*, No 44852-1-II at page 15 (See also *O'Neil v. City of Shoreline*, 170 Wn2d 138, 152 (2010).)

*Sanders v State*, 169 Wn2d. 827 (2010), cited by White, is factually distinguishable from the present matter. In *Sanders*, the court determined that the Attorney General's office had wrongfully withheld records. In Washington, courts have assessed penalties only where a defendant has been found to have improperly withheld records. See *Nissen v. Pierce County*, 183 Wn.2d. 863, 357 P.3d 45 (2015). In the present case, the superior court specifically found that as the County did not wrongfully withhold voted ballots, White did not prevail on any of the issues in his motion to show cause. There was, therefore, no basis to make an award of costs of fees against the County.

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<sup>58</sup> *Skagit*, 355 P.3d at page 1107, "Because the counties did not violate the Public Records Act, there is no basis to assess penalties or attorneys' fees against them."

## V. CONCLUSION

As it is required to, the superior court followed the holdings of the Court of Appeals, which, in turn, relied on Art. VI, Sec. 6's absolute ballot secrecy requirements, Title 29A RCW's ballot security scheme, and this Court's PRA precedent to conclude that voted ballots are exempt from disclosure. Whether the minimum statutory retention period has expired or not, voted ballots remain secret ballots and are always subject to the constitutional mandate of secrecy. The laws and regulations adopted pursuant to Art. VI, Sec. 6 of the Washington Constitution satisfy this constitutional mandate for ballot secrecy, while providing a comprehensive method for members of the public to observe election staff as they process and tabulate ballots and oversee the elections process, eliminating any constitutional or public interest issues. The superior court followed Washington's constitutional, statutory and case law in finding that White is not entitled to obtain copies of voted ballots under the PRA.

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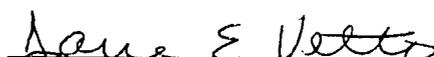
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Because White has not met his burden of showing otherwise, his appeal should be denied.

DATED this 27th day of May, 2016.

RESPECTFULLY SUBMITTED:

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*Attorney for Respondent Clark County*

CERTIFICATE OF SERVICE

I, Thelma Kremer, hereby certify, under penalty of perjury under the laws of the State of Washington, that on the date noted below, I caused service of the foregoing *Respondent's Brief* to be made on the parties as follows:

Marc Zemel  
Eric D. Lowney  
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2317 E John St  
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U.S. Mail  
 Facsimile  
 Hand Delivered  
 Email to:  
[marcz@igc.org](mailto:marcz@igc.org)  
[knoll@igc.org](mailto:knoll@igc.org)

DATED this 27th day of May, 2016.

  
Thelma Kremer

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
CLERK'S OFFICE

May 27, 2016, 3:38 pm

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RECEIVED ELECTRONICALLY

APPENDIX 1

*This is a request for public records under RCW Chapter 42.56.*

Nov. 6, 2013

RE: Public records request for ballot image files

Dear County Officials:

*1. Request*

Pursuant to the state Public Records Act, I request copies of electronic or digital image files of all *pre-tabulated* ballots received, cast, voted, or otherwise used in the County's current Nov. 5, 2013 General Election.

*2. Intent of request*

This request intends to obtain a digital copy of each electronic or digital ballot image file created or held by the county, and before the ballot is tabulated.

This request intends to include copies of image files of the following sets:

1. ballots to be tabulated in whole or in part
2. ballots not to be tabulated, with reason for rejection noted
3. ballots and ballot declarations, attachments and the emails themselves for votes received by email
4. ballots and ballot declarations and sheets received by fax or other electronic transmission
5. ballots voted on voting machines
6. duplicated ballots
7. other sets of image files of ballots used in the election

I intend to request as "ballot images" all images created, received or used *before tabulation*, of contents and enclosures of all Return Envelopes or other voting acts or voting attempts, whether legal "ballots" or not, whether standard or not, whether valid or not, whether to be tabulated or not.

This request intends to include the original metadata and Properties of the electronic or digital files requested.

*3. Request for waiver of the "no continuing obligation" provision of the PRA*

My intent is to request copies of the image files of ballots in the Nov 5 General Election, *before their votes are tabulated*.

I understand that digital scanning of ballots into image files is currently ongoing, and may continue as ballots come in right up to county Certification.

I understand tabulation commenced only at 8 pm on Election day, and continues daily or frequently or every three days up to Certification.

I realize that many ballots were tabulated before your receipt of this request.  
I am not requesting ballot image files of ballots already tabulated.

However, perhaps a great many of the ballot image files I seek copies of will be created in the coming days, and agencies need not honor prospective requests for records not yet in their possession. Agencies have no continuing obligation to disclose records they don't hold at the time a records request is received.

Consequently, between now and Certification many records request windows will open with ballot image file creation, and close with their tabulation following more or less immediately. If the county invokes the "no continuing obligation" provision, records I seek copies of are only available in these windows, which will be narrow, intermittent, and hard to predict and schedule in advance. Imagine the nightmare of sending and responding to the avalanche of requests required to be sure one arrives in every window!

You see the quandary if I want to assure I have a properly formed request for all Nov 5 General Election ballot images after you have them but before their tabulation.

Agencies need not fulfill prospective requests, but neither are they prohibited from accepting them.

Considering the same parameters in a different request, Clark County proposed this simple reasonable solution:

"Clark County acknowledges that you have made a request for all images created by the Hart Intercivic Voting System in the Clark County November 2, 2010 election. I agree that there is no need for you to send multiple requests at six hour intervals. As I previously offered, we can give you one final response indicating the total number of images after certification and re-send you the exemption log at that time."

Kindly respond to my request for the county to waive the "no continuing obligation" provision, for this request only, by simply acknowledging my request covers all the Nov 5 General Election ballot image files. I am open to any solution that assures I've successfully registered the request I intend.

(To release or disclose is of course your entirely separate consideration.)

#### *4. Exclusions*

This request excludes:

- a. the Return Envelopes themselves.
- b. the Security Envelopes or Sleeves.
- c. signature images files.

This request does not seek to inspect or copy the paper ballots themselves, voter registration forms (unless incorporated into a Military or Overseas ballot received electronically) or to obtain hard copies of ballot images. It is limited to copies of electronic or digital files.

*I emphasize that I am not requesting copies of any ballot image file created after its ballot is tabulated.*

#### *5. Copy format requested*

I request copies of records in the same electronic or digital file formats in which they were created or received or used.

I additionally request copies of the records in a format viewable on an up-to-date home computer.

Examples:

- a) Hart Intercivic voting system ballot images in .tif or other file format.
- b) Hart ballot images of ballots voted on voting machines may be in a different file format.
- c) Ballot images received by email or fax, and ballot images derived from email or fax ballots, may exist in a variety of image formats (for example, .pdf, .jpg, .jpeg, .gif, .bmp).

The same voted ballot may therefore exist as more than one ballot image and in more than one file format. In such cases, this request seeks a copy of each file format of that ballot image. Please specify when disclosing more than one ballot image file format of the same ballot.

#### *6. Medium of delivery requested*

Order of preference:

- a) Posting on the County website
- b) Uploading disclosed files onto Public Access Television server. Capacity and arrangements are provisionally in place; please contact me for upload details.
- c) Other flash memory card readily read by up-to-date home computer
- d) Appropriate capacity flash drive
- d) DVD
- e) CD

#### *7. Proposed delivery schedule*

The value of these requested records is time-sensitive.

In the case of requested overseas and military voter registrations received electronically up to and including Election day, the window to research and document a challenge is but two weeks, I believe.

Prompt disclosure within the PRA's five-day period is requested.

#### *8. In event of denials or redactions*

If my request be denied in whole or part, or redacted, I ask that you include in your denial/redaction:

1. A log of records or parts of records withheld or redacted.

2. For each denial and redaction, citation by RCW text quotation of the specific explicit exemption to disclosure. For clarity kindly add *emphasis* freely and avoid ellipsis (...) omission of statute text.
3. A brief explanation of how the quoted exemption applies to the specific records withheld or redacted.

I repeat that perhaps the simplest way to accomplish my request is to copy content of each MBB (Mobile Ballot Box) or other flash memory card after removal from the central scanner(s) and before insertion in the Tabulator.

I realize an election is your busiest most demanding time of year. I am trying to tailor my request to minimize and automate county effort without disruption of the election. If there is anything I can do to assist in clarifying or shaping this request, please do not hesitate to let me know.

Email to [timwhite@rockisland.com](mailto:timwhite@rockisland.com) is the way to reach me.

Thank you kindly for your assistance with this request.

Sincerely,  
Tim White  
[timwhite@rockisland.com](mailto:timwhite@rockisland.com)

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
CLERK'S OFFICE

May 27, 2016, 3:38 pm

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RECEIVED ELECTRONICALLY

APPENDIX 2

THE SUPREME COURT OF WASHINGTON

TIMOTHY WHITE,  
Petitioner,  
v.  
CLARK COUNTY,  
Respondent.

NO. 92172-5

ORDER

C/A NO. 46081-5-II

Filed *E/M*  
Washington State Supreme Court

MAR - 4 2016  
*E*  
Ronald R. Carpenter  
Clerk

This matter came before the Court on its March 3, 2016, En Banc Conference. The Court considered the Petition and the files herein. A majority of the Court voted in favor of the following result:

Now, therefore, it is hereby

ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 4th day of March, 2016.

For the Court

*Madsen, C. J.*  
CHIEF JUSTICE

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
CLERK'S OFFICE

May 27, 2016, 3:38 pm

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APPENDIX 3



RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
CLERK'S OFFICE

May 27, 2016, 3:38 pm

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APPENDIX 4

**From:** Tim White [mailto:timwhite@rockisland.com]  
**Sent:** Thursday, July 02, 2015 4:50 AM  
**To:** Cnty Elections General Delivery; Garber, Cathie; Kimsey, Greg; Crowell, Kim; Tilton, Rebecca; McCauley, Mark; [Lori.Volkman@clark.wa.gov](mailto:Lori.Volkman@clark.wa.gov)  
**Subject:** Public Records Request for Clark Co records from Gen Election of Nov 5, 2013

*This is a request for public records under RCW Chapter 42.56.*

July 2, 2015

Dear Clark County Officials:

Pursuant to the Washington State Public Records Act, please accept my request for copies of election records from the Nov 5, 2013, General Election. This request refreshes my request, dated Nov 6, 2013, for many of the same election records, in light of the end of the 60-day retention period for these records. Please immediately prevent destruction of the records described below, as required by law. RCW 42.56.100.

**Request**

I request copies of paper ballots, ballot images, return envelopes and all other records from the Nov 5, 2013, General Election (the "election"). This includes copies of electronic records created by the Hart Intercivic, Inc. election system when received ballots are scanned (referred to herein as "ballot images").

A. This request intends to include, but not be limited to:

1. paper ballots received, cast, voted, or otherwise used in the election
2. images of ballots received, cast, voted, or otherwise used in the election
3. return envelopes from the election

B. This request intends to include, but not be limited to, the following sets:

1. ballots to be tabulated in whole or in part
2. ballots not to be tabulated, with reason for rejection noted
3. ballots and ballot declarations, attachments and the emails themselves for votes received by email
4. ballots and ballot declarations and sheets received by fax or other electronic transmission
5. ballots voted on voting machines
6. duplicated ballots
7. other sets of image files of ballots used in the election

I intend to include all contents and enclosures from all Return Envelopes or other voting acts or voting attempts, whether legal "ballots" or not, whether standard or not, whether valid or not, whether tabulated or not.

For all digital or electronic records and files, this request intends to include all original metadata and all subsequently generated or derived metadata, such as file properties (as, for examples, from the "File-Properties" menu, and from the "Properties" choice available from the file's right-click menu in Windows Explorer.

**Exclusions**

This request excludes:

- A. Security Envelopes or Sleeves
- B. voter registration forms, unless incorporated into a Military or Overseas ballot received electronically
- C. (only in the case of copies) signatures on voter Declarations

**Method of fulfilment of request**

Note: I prefer electronic copies of all records.

- A. Please provide electronic copies of all paper-only records requested, such as the paper ballots and return envelopes.
- B. Please provide electronic copies of all electronic or digital records requested:
  1. in the electronic format that is used by the agency and is generally commercially available,
  2. in a format that is reasonably translatable from the format in which the record is kept, AND

3. in a format viewable on an up-to-date home computer
- C. I request inspection of any records that cannot be provided as electronic copies per A and B above.

**Medium of fulfilment of request**

*Order of preference:*

- A. posting on the County website
- B. appropriate capacity flash drive
- C. DVD
- D. CD

If there is anything I can do to assist in clarifying or shaping this request, or anything you can do to assist me in shaping or reframing my request to better obtain my goals or to facilitate your fulfilment of my request, do not hesitate to let me know.

Email to [timwhite@rockisland.com](mailto:timwhite@rockisland.com) is the way to reach me.

Thank you kindly for your attention to this request, and I look forward to your providing the fullest assistance and the most timely possible action on this request. I intend to cooperate in whatever way I can.

Sincerely,  
Tim White  
[timwhite@rockisland.com](mailto:timwhite@rockisland.com)

## OFFICE RECEPTIONIST, CLERK

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**To:** Kremer, Thelma; marcz@igc.org; knoll@igc.org  
**Cc:** Vetto, Jane  
**Subject:** RE: Timothy White v. Clark County; Supreme No. 92696-4; Respondent's Brief

Received 5-27-2016

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

**From:** Kremer, Thelma [mailto:Thelma.Kremer@clark.wa.gov]  
**Sent:** Friday, May 27, 2016 3:21 PM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>; marcz@igc.org; knoll@igc.org  
**Cc:** Vetto, Jane <Jane.Vetto@clark.wa.gov>  
**Subject:** Timothy White v. Clark County; Supreme No. 92696-4; Respondent's Brief

Attached for filing please find *Respondent's Brief* regarding the following matter:

*Matter:* Timothy White v. Clark County  
*Case No.:* 92696-4  
*Filer:* Jane Vetto, WSBA #21649  
Attorney for Respondent, Clark County  
Tele: (360) 397-2478  
Email: [jane.vetto@clark.wa.gov](mailto:jane.vetto@clark.wa.gov)

A hard copy of the Appendices has been placed into the mail for the Court. This email, with its attachments, constitute service on Plaintiff's counsel, in addition to a hard copy being placed in the U.S. mail. If you have any questions, please contact this office. Have a great Memorial Day weekend!

*Thelma Kremer*  
Clark County Prosecutor's Office - Civil Division  
PO Box 5000  
Vancouver WA 98666-5000  
Tele: (360) 397-2478  
Fax: (360) 397-2184  
Email: [thelma.kremer@clark.wa.gov](mailto:thelma.kremer@clark.wa.gov)

This e-mail and related attachments and any response may be subject to public disclosure under state law.